Supreme Court, U.S.
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-85-254

No. .....

In The
Supreme Court of the United States
October Term, 1985

KEARNEY & TRECKER CORPORATION,
Petitioner,

v.

GULF SOUTH MACHINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:
M. Hepburn Many
Many, Lo Coco & Kimble
1304 First NBC Building
New Orleans, LA 70112
(504) 522-5215

Malcolm Dow Young*
Young & White
8901 Indian Hills Drive
Suite 210
Omaha, NE 68114
(402) 393-5600

Attorneys for Petitioner
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether there is a "plain error" exception to Fed. R. Civ. P. 51 and, if so, whether it can be invoked to avoid substantial injustice absent specific objections, as in most federal circuits, or can only be invoked upon specific objection or under circumstances amounting to "plain error" under Fed. R. Crim. P. 52, as in a minority of circuits.

2. Whether requests for, and objections to, jury instructions are preserved under Fed. R. Civ. P. 51 where the trial court is informed of a party's position, and expressly preserves the objections following the jury charge.

3. In areas of law other than those involved in questions 1 and 2: Whether this court should exercise its power of supervision, and its discretion to certify questions of unsettled state law to a state's highest court, where a circuit court's interpretations of state law conflict with the interpretations of both the district court and the state's highest court (between which there is also a conflict), yet the circuit court upholds a verdict on the ostensible grounds that the verdict is "in lock step" with state law.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

Kearney & Trecker Corporation petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, App. 1-13) is reported at 756 F.2d 377. The judgment of

*Kearney & Trecker Corporation is a wholly owned subsidiary of Cross & Trecker Corporation. Other interested parties include Gulf South Machine, Inc., Walerij Holak, Stanislav Holak, Metchislav Holak.

the district court (App. C, *infra,* App. 15-18) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra,* App. 1-13) was entered on April 1, 1985. A petition for rehearing was denied on May 15, 1985 (App. B, *infra,* App. 14). The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 51 provides:

Rule 51. Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On March 6, 1981, respondent filed this suit in the United States District Court for the Eastern District of Louisiana under two alternative theories of recovery (App. D, *infra*, App. 19-22). The first theory (redhibition) sought rescission of the sale of a machining center sold to respondent by petitioner, and a refund of the purchase price. The second theory (*quanti minoris*), in the alternative, sought a reduction of the purchase price and retention of ownership of the machining center by respondent. The suit also sought consequential damages.

At the charge conference (Trial Transcript, Volume VIII, p. 78, line 1 through p. 102, line 20, and Volume IX, p. 2, line 1 through p. 9, line 13; hereinafter VIII-78:1-102:20, IX-2:1-9:13) petitioner orally requested instructions under both of respondent's alternative theories of recovery and specifically objected to the trial court's deletion of a crucial sentence which characterized respondent's *quanti minoris* theory. IX-5:2-6.

The latter sentence would have definitively instructed the jury that ". . . a buyer who continues to use a purchased product after discovery of the defective condition is not entitled to a rescission of the purchase contract, but only to any reduction in price warranted by proof . . . ". This instruction was especially pertinent to this case because respondent had in fact continued to use the machining center, and the center — despite its alleged defects — had directly enabled respondent to show annual profits in excess of $1,000,000.00 for the first time in its history.

The trial court, nonetheless, deleted this crucial instruction because it did not think it was necessary, IX-3:12-23, and thereafter instructed counsel that ". . . the alternatives and the examples are what you have to argue. . . .". IX-4:12-13. Petitioner's objection to the deletion of this instruction was expressly preserved both immediately after the objection was made, IX-5:2-6, and immediately after the jury was charged. IX-76:18-22.

Once the *quanti minoris* charge had been deleted, the jury was instructed only under respondent's redhibition theory, and express warranty theory, IX-56:1-70:7; and was provided with interrogatories which covered only the redhibition and express warranty theories. IX-70:8-75:4.

Respondent's *quanti minoris* theory was never submitted to the jury. To the contrary, after giving specific instructions on the interrogatories, the trial court stated:

> [T]hat's why you got two pages because the plaintiff has brought two causes of action. One based on redhibition and the other on the legal concept of expressed warranty where you must consider whether or not there has been a breach of expressed warranty and either one of these could entitle the plaintiff to damages. You will notice that the damages are different, based on two different theories. I think you can get a picture of what the plaintiff is asking for by that kind of explanation.

IX-74:21-75:4.

The instruction under respondent's *quanti minoris* theory had vanished, but the objection to its disappearance was preserved following the foregoing instruction. IX-76:18-22.

The jury returned a verdict under the redhibition theory, without having been instructed on credit for use

in the event of rescission of the sale, or on the *quanti minoris* theory which would have allowed respondent to keep its productive machining center at a reduced price.

On appeal to the Fifth Circuit, petitioner argued in part that the trial court had erred in not instructing the jury that petitioner was entitled to a credit for respondent's use of the machining center, and in instructing the jury that respondent could recover lost profits. Petitioner argued that it had requested the credit for use instruction and had objected to the lost profits instruction, and that, in any event, the trial court's failure to instruct regarding credit for use, and instructions regarding lost profits, constituted "plain error".

The Fifth Circuit ruled that petitioner had not requested a credit for use instruction, but that a requested reduction charge was included in the *quanti minoris* charge — apparently overlooking the fact that the *quanti minoris* charge had not been given. The Fifth Circuit also ruled that petitioner had not preserved objections to the instructions — apparently overlooking the specific objection made during the charge conference, and the trial court's preservation of the objection after charging the jury. The Fifth Circuit did not address petitioner's "plain error" argument, but, instead, compounded the error by overlooking specific objections to the instructions, and stating that an instruction had been given which, in fact, had not.

Petition for rehearing was denied.

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REASONS FOR GRANTING THE WRIT

I. The Decision Below Hastens The Erosion Of The "Plain Error" Exception To Rule 51 Of The Federal Rules Of Civil Procedure, In Concert With Decisions Of The Ninth And District Of Columbia Circuits, And In Conflict With This Court's Recent Recognition Of The "Plain Error" Exception As A Means To Avoid Substantial Injustice.

The trial court clearly erred in failing to instruct the jury that it could leave the machining center with respondent at a reduced price, as an alternative to rescinding the sale and refunding the entire purchase price. *Sunkist Growers v. Winckler & Smith,* 370 U.S. 19. The Fifth Circuit clearly erred in not recognizing this as "plain error", especially since petitioner had objected to the deletion of this instruction. The Fifth Circuit's reliance on Rule 51 in a precedent-free vacuum, and refusal to invoke the "plain error" exception to Rule 51 on the grounds that objections were not made, erodes the "plain error" exception to Rule 51 to a degree which enables injustice, thereby requiring this Court to restore uniformity of procedure in the interest of fundamental justice.

Rule 51 stands as promulgated in 1937. Its requirements are satisfied if, on the entire charge, a jury has been fairly and adequately instructed. *Gibson v. Lockheed Aircraft Service,* 350 U.S. 356. Fairness to the trial court and the parties requires that specific objections to a charge be made at trial so that error can be corrected without conducting a new trial. *Palmer v. Hoffman,* 318 U.S. 109. The "plain error" exception to this requirement is invoked to correct obvious instances of injustice or misapplied law, *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, al-

though this Court has recognized a split among the circuits on the issue of whether the "plain error" exception can be invoked absent specific objection at trial. *Id.* at 256, n. 13.

The Ninth Circuit, in *Moore v. Telfon Communications Corp.,* 589 F.2d 959, 966 (9th Cir. 1978) stated that the "plain error" rule could not be invoked under Rule 51 to obtain review of instructions, given or refused, where objection was not raised in the trial court. The District of Columbia Circuit, in *Dellums v. Powell,* 566 F.2d 167 (D.C. Cir. 1977), has declined to decide whether there is a "plain error" exception to Rule 51, but has stated that if there is such an exception it should be limited to circumstances which would amount to "plain error" under Rule 52, Fed. R. Crim. P. *Id.* at 191, n. 63, *citing Henderson v. Kibbe,* 431 U.S. 145, 154. *See also Hobson v. Wilson,* 737 F.2d 1, 31-32, n. 96 (D.C. Cir. 1984).

In the instant case, the Fifth Circuit has refused to invoke the "plain error" exception to correct an obvious instance of injustice and misapplied law under an erroneous conclusion that objections were not raised at trial. In so doing, the Fifth Circuit decision conflicts with prior rulings of this Court on erroneous jury instructions, *Sunkist Growers v. Winckler & Smith,* 370 U.S. 19, and on the criteria for invoking the "plain error" exception to Rule 51. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256.

This case represents a dangerous precedent in the orderly administration of justice. By ignoring petitioner's "plain error" argument, the Fifth Circuit joins the Ninth Circuit and the District of Columbia Circuit in undermin-

ing the "plain error" exception to Rule 51, and extends the exclusion of the "plain error" exception to situations where objections were made, and expressly preserved, at trial.

This conflict among the circuits involves a frequently recurring question of civil procedure which only the Supreme Court can resolve. All litigants in the federal system rely on the orderly administration of the Federal Rules of Civil Procedure, and upon the federal courts to promote the ends of justice, not to defeat them. *Hormel v. Helvering,* 312 U.S. 552, 557. This Court has never directly addressed the question of whether there is a "plain error" exception to Rule 51, apparently because the circuits have generally recognized the exception. The Ninth and District of Columbia Circuits are dangerously eroding the plain error exception, and the Fifth Circuit's refusal to consider the exception has caused an unjust decision which jeopardizes the rights of litigants subject to the Fifth Circuit's jurisdiction. Consequently, the petitioner asks this Court to remedy a wrong of substantial significance, and to insure that the federal judiciary is fairly and uniformly applying the "plain error" exception.

II. A Series Of Procedural Departures And Conflicting Interpretations Of Unsettled State Law Requires Certification Of Questions Of State Law To The State's Highest Court, And Correction Of The Fifth Circuit's Disposition Of This Matter.

Petitioner appreciates this Court's self-imposed restrictions on its exercise of discretion to certify questions of state law to a state's highest court. *Lehman Brothers v. Schein,* 416 U.S. 386. Petitioner, however, stresses the

need for supervision of the Fifth Circuit in this instance to avoid a substantial miscarriage of justice, and to prevent a precedent which could cause unjust results to merchant sellers in the future. Petitioner does not ask this Court to resolve questions of unsettled state law, but simply points out that the circuit court's interpretation of state law governing offer and acceptance conflicts with the interpretations of both the district court and the state's highest court, which also conflict, yet the circuit court upheld a jury verdict on the grounds that the verdict was "in lock step" with state law.

Early in the trial, petitioner requested the district court to rule that the warranty provisions between petitioner and respondent were binding upon respondent as a matter of law. The district court refused to do this, and instead submitted to the jury the question of whether respondent, a merchant, was made aware of the warranty provisions in question.

On appeal, petitioner argued that the district court erred in this regard. The Fifth Circuit ignored this argument, and circumvented it by reversing a district court ruling on the formation and terms of the contract. *Gulf South Machine, Inc. v. Kearney & Trecker Corp.*, 756 F. 2d 377, 380 (5th Cir. 1985). This ruling had been made on the first day of trial, expressly to govern trial proceedings (I-48:7-14), yet the circuit court did not remand for new trial under its new, determinative ruling.

Without asking this Court to resolve questions of unsettled Louisiana law, petitioner simply points out that the cases relied on by the circuit court do not stand for the propositions asserted by the circuit court. There is clearly

a conflict in the interpretations of the Fifth Circuit, the District Court for the Eastern District of Louisiana, and the highest court of the state of Louisiana, as to the law governing the central issues of this case. The only way out of this quagmire is to certify questions of state law to the highest court of the State of Louisiana, and to order a new trial under the Louisiana court's interpretation of law governing offer and acceptance. Petitioner did not request certification of questions of state law by the circuit court, because the issues to be dealt with did not include the circuit court's reversal of the district court's interpretation of Louisiana law. In its Petition for Rehearing, however, petitioner asked the Court of Appeals to reconsider its rulings on these questions of law for the first time.

In a nutshell, this case involves federal interpretations of state law which is unsettled and novel because of Louisiana's modified version of the Uniform Commercial Code. It is clear from the conflicting interpretations in this case that the federal district and circuit courts had a difficult time interpreting Louisiana law in this context. Under the circumstances, justice requires certification of the issues of state law, which are central to this case, to the highest court of Louisiana upon remand for new trial.

Finally, the circuit court's reversal of the trial court on the law governing the central issues of this case, without remanding for a new trial, constitutes a procedural departure which requires this court to provide direction to the Fifth Circuit regarding fundamental requisites of due process of law.

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CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant a Writ of Certiorari to provide guidance to the circuits on the unsettled questions of whether there is a "plain error" exception to Fed. R. Civ. P. 51, and if so, the criteria for invoking it. Justice requires this Court to remand this case for a new trial, with directions to certify unsettled and novel questions of state law to Louisiana's highest court.

DATED this 13th day of August, 1985.

Respectfully submitted,

MALCOLM DOW YOUNG
YOUNG & WHITE
8901 Indian Hills Drive
Suite 210
Omaha, Nebraska 68114
(402) 393-5600

and

M. HEPBURN MANY
MANY, LO COCO & KIMBLE
1304 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
(504) 522-5215

Attorneys for Petitioner

APPENDIX A

GULF SOUTH MACHINE, INC.,

Plaintiff-Appellee,
Cross-Appellant,

v.

KEARNEY & TRECKER CORPORATION,

Defendant-Appellant,
Cross-Appellee.

No. 82-3766

United States Court of Appeals, Fifth Circuit.

April 1, 1985.

Buyer of computerized machine brought action for rescission of sale or for reduction of purchase price, together with damages due to redhibitory defects. The United States District Court for the Eastern District of Louisiana, Robert F. Collins, J., entered judgment in favor of buyer, and seller appealed. The Court of Appeals, Politz, Circuit Judge held that: (1) seller failed to sufficiently disclaim implied warranty against redhibitory defects; (2) buyer's logbook recording malfunctions of machine was properly admitted under business records exception; (3) seller did not adequately preserve for appeal its claims of error relating to jury instructions; and (4) buyer could not recover amount billed by seller for parts and services on machine which buyer in fact never paid.

Affirmed as modified.

1. Sales 22(1, 3)

Under Louisiana law, price list sent upon request to customer constitutes offer, and contract of sale is com-

pleted when customer accepts offer by placing order for goods in accordance with price list.

2. Sales 23(4)

Even if buyer's purchase order could be characterized as offer, seller's acknowledgment form would not qualify as acceptance for failing to match terms of offer; disclaimer of implied warranties provision of acknowledgment form markedly differed from codical warranty against redhibitory defects which was implied by Louisiana law in buyer's purchase order.

3. Sales 267

Under Louisiana law, disclaimer of warranty against redhibitory defects must be express.

4. Sales 267

Ex parte actions by vendor are insufficient to modify warranty against redhibitory defects implied under Louisiana law; such warranty can only be changed or modified by express agreement of both parties.

5. Sales 267

To suffice as waiver of warranty against rehibitory defects under Louisiana law, purported waiver must be clear and unambiguous, must be contained in sale documents, and must be brought to purchaser's attention.

6. Sales 267

Line in capital letters on bottom front of seller's acknowledgment form stating "(SEE CONDITIONS OF ACCEPTANCE ON BACK HEREOF)" did not make seller's fine print warranty disclaimer on back of form suf-

ficiently conspicuous to be effective under Louisiana law against buyer who did not otherwise agree to disclaimer.

7. Sales 267

Although safeguards which protect nonbusiness consumers are more stringent than those protecting businessmen, waiver of warranty against redhibitory defects is nevertheless scrutinized very carefully under Louisiana law to make sure that both parties have agreed to waiver, even where buyer is businessman.

8. Evidence 351

Trial court did not abuse its discretion in admitting in buyer's action to rescind sale of machine, under business records exception, logbook in which buyer had recorded malfunctions of machine; buyer's keeping of logbooks on its machines was regular practice, and entries were made immediately after malfunctions had occurred or within 24 hours of difficulties. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.

9. Federal Courts 636

Defendant's failure to specifically object to lack of certain jury charge prevented Court of Appeals' consideration of claim of error relating to failure to give charge. Fed.Rules Civ.Proc.Rule 51, 28 U.S.C.A.

10. Federal Courts 637

Defendant could not raise on appeal alleged error in giving of jury instruction under theory not presented before trial court. Fed.Rules Civ.Proc.Rule 51, 28 U.S.C.A.

11. Sales 418(1)

Under Louisiana law, buyer of defective machine was not entitled to recover amount charged by seller for parts

and services on defective machine, where buyer had in fact never paid such amount.

12. Federal Civil Procedure 2742.5

Evidence in form of copies of bills showing charges of plaintiff's attorney for services rendered up to week before trial, and that attorney thereafter represented plaintiff through eight days of trial, was sufficient to support award of $30,000 in attorney fees.

13. Federal Civil Procedure 2743

Buyer who brought successful action to recover for defects in machine was not entitled to attorney fees in seller's appeal.

Many, Lococo & Kimble, M. Hepburn Many, New Orleans, La., Young & White, Malcolm D. Young, Omaha, Neb., for defendant-appellant, cross-appellee.

Lemle, Kelleher, Kohlmeyer & Matthews, Wm. S. Penick, New Orleans, La., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:

In this diversity jurisdiction case, Kearney & Trecker Corporation (K & T) appeal a jury verdict awarding Gulf South Machine, Inc. (GSM) the sum of $398,577 in an action in redhibition. Finding no evidentiary support for

an award of $14,757 for expense reimbursement, we vacate that portion of the judgment and affirm the judgment as so modified.

Facts

GSM, owned by the brothers Larry, Stan, and Mike Holak, operates a machine shop in Ponchatoula, Louisiana, making metal components for *inter alia*, the oil industry. K & T is a Milwaukee, Wisconsin manufacturer of computerized machines designed for the machining of metal components.

At a 1978 Chicago International Machine Tool Show, Larry Holak was impressed by a large computerized Milwaukee-Matic 180 Machinery Center (MM-180) manufactured by K & T. Holak approached James Halbert of the Oliver H. Van Horn Company, K & T's authorized dealer in Louisiana, to explore the possibility of purchasing one of the units. At Holak's request, Halbert sent GSM a written proposal describing the MM-180 and listing prices for the basic machine and various accessories. The proposal contained other terms of sale such as shipping requirements and taxes. After receiving Halbert's proposal, GSM submitted to Oliver H. Van Horn Company a purchase order for an MM-180 and selected accessories. In addition to listing the machine and accesories, the purchase order contained shipping and payment terms.

Upon receipt of the purchase order, K & T sent an acknowledgment form to GSM. The front of the form contained a statement that it was an acceptance only upon the terms and conditions listed on the reverse side. The back of the form contained a declaimer of all implied warranties. The evidence indicates that the Holak brothers

simply filed the acknowledgment with their purchase order and were not made aware of the warranty clause until they consulted an attorney preparatory to filing the instant suit.

The MM-180 was installed at GSM in January of 1980. GSM immediately experienced substantial, continuous difficulties. The equipment malfunctioned the very first time it was energized and was "down" for two weeks. This was a harbinger of things to come. In the first 18 months the MM-180 was out of service approximately one-third of the time. During the first 10 months K & T servicemen replaced 258 defective parts. In September 1980, after the machine had been inoperable for three weeks, GSM asked K & T for a replacement. K & T refused. GSM had paid the full purchase price within two months of installation, but when it declined to pay a repair bill in November 1980, K & T terminated all further service although two months remained on the one-year warranty. GSM sued for rescission of the sale or for *quanti minoris*, reduction of the purchase price, together with damages because of redhibitory defects in the MM-180.

After an eight-day trial, the jury returned a special verdict finding that the MM-180 was defective in its manufacture, design, or construction rendering it either absolutely useless or making its use so inconvenient and imperfect that GSM would not have purchased it had it known of the defects. The jury also found that the waiver of warranty clause on the back of the acknowledgment form was not brought to the attention of GSM or explained to it; that GSM did not misuse the product; and that GSM was entitled to $153,820 in refund of the pur-

chase price, repayment for $14,757 of expenses incurred, $30,000 in attorneys' fees, and $200,000 in other damages. The district court entered judgment for $398,577 after denying the defendant's motion for judgment n.o.v. or new trial.

The Disclaimer of Warranties

K & T argues and the district court found that GSM's purchase order was an offer and K & T's acknowledgment form was an acceptance. Based upon this finding, K & T argues that the disclaimer of warranties on the back of the form was a term of the contract since GSM did not object to it within 15 days in accordance with the terms of the form. K & T then argues that the contract should be enforced in accordance with its terms and GSM should be found to have waived the implied warranty against redhibitory defects. Unless waived, that warranty applies to every Louisiana sales contract. GSM, on the other hand, argues that the waiver on the reverse side of the acknowledgment form was not a term of the contract because K & T's proposal through the Oliver H. Van Horn Company was the offer and GSM's purchase order was the acceptance creating the contract of sale. Thus, GSM argues, the acknowledgment form was extraneous to the contract of sale.

[1, 2] Under Louisiana law, a price list sent upon request to a customer constitutes an offer and the contract of sale is completed when the customer accepts the offer by placing an order for goods in accordance with the price list. As the Louisiana intermediate appellate court stated in *North Louisiana Milk, Etc. v. Southland Corp.*, 352 So.2d 293, 296 (2d Cir.La.App. 1977, *citing*

Litvinoff, *Obligations,* 6 La. Civil Law Treatise § 130, pp. 211-213 (1969):

> [W]hen a merchant, on request, sends a price list to a customer who orders goods in accordance with the price list, there is a contract formed between them for the price and upon conditions mentioned in the price list.

From the foregoing, it is apparent that the district court erroneously characterized GSM's proposal as an offer. But even if that characterization had been correct, K & T's acknowledgment form would not qualify as an acceptance because it did not match the terms of the offer and could be nothing more than a counterproposal. Litvinoff, *Obligations,* 6 La.Civil Law Treatise § 186, p. 338 (1969). The disclaimer of implied warranties provision of the acknowledgment markedly differed from the codical warranty against redhibitory defects which was implied in GSM's purchase order.

[3, 4] Louisiana law mandates that a disclaimer of the warranty against redhibitory defects must be express. *Stevens v. Daigle and Hinson Rambler, Inc.,* 153 So.2d 511 (La.App.1963), reminds that the Civil Code based rights to redhibition can be abrogated only by "an express waiver or modification of the warranty by agreement between the vendor and vendee." Ex parte actions by the vendor are insufficient, for as that court noted "the vendor by any act on his part alone may not modify the warranty implied in all sales in Louisiana but such warranty can only be changed or modified by express agreement of both parties." *Id.* at 514. There is no evidence that GSM expressly agreed to a waiver of the implied warranties impressed on all sales by the Civil Code.

The mere receipt and filing of the acknowledgment form is not enough.

[5, 6] To suffice as a waiver of the warranty against redhibitory defects, the purported waiver (1) must be clear and unambiguous, (2) must be contained in the sale documents, and (3) must be brought to the purchaser's attention. *Prince v. Paretti Pontiac Co., Inc.,* 281 So.2d 112 (La.1973); *Anderson v. Bohn Ford, Inc.,* 291 So.2d 786 (La.App.1973). K & T argues that in cases between a business buyer and a business seller the third part of the test should be read to require only that the disclaimer be conspicuous. It further argues that the line in capital letters on the bottom front of the acknowledgment form stating, "(SEE CONDITIONS OF ACCEPTANCE ON BACK HEREOF)" made the fine print warranty disclaimer on the back of the form sufficiently conspicuous to meet the third prong of the *Prince* test. This argument is not supported by Louisiana law.

[7] The Uniform Commercial Code cases cited by K & T are inapplicable. Louisiana law on redhibition is not the same as the correlative U.C.C. provisions and is the principle obstacle to Louisiana's adoption of Article 2 of the U.C.C. Mashaw, "A Sketch of the Consequences for Louisiana Law of the Adoption of Article II: Sales of the Uniform Commercial Code," 42 Tul.L.Rev. 740 (1968). While K & T is correct in its statement that the safeguards which protect non-business consumers are more stringent than those protecting businessmen, a waiver of the warranty against redhibitory defects is nevertheless scrutinized very carefully to make sure that the third prong of the test is satisfied even where the buyer is a businessman.

Since the Louisiana Supreme Court decision in *Prince* in 1973, there have been only four reported cases in which the waiver has been found to be effective: *Louisiana Nat. Leasing Corp. v. ADF Serv.*, 377 So.2d 92 (La.1979); *Capital City Leasing Corp. v. Hill*, 394 So.2d 1264 (La.App. 1981); *FMC Corp. v. Continental Grain Co.*, 355 So.2d 953 (La.App.1977); *Anderson v. Bohn Ford, Inc.*, 291 So.2d 786 (La.App.1973). In each case, the document containing the waiver was signed by the buyer, and in two of the cases, the agreement was examined by lawyers prior to execution. In each case, the court emphasized the signature and/or the examination by legal counsel before signing. In four other cases, the Louisiana courts have refused to find that the third prong of the test was met despite the fact that the business buyer signed the waiver. *Linch Intern. Trucks, Inc. v. Pierre*, 434 So.2d 1225 (La.App.1983); *Tuttle v. Lowrey Chevrolet, Inc.*, 424 So.2d 1258 (La.App.1982); *Equilease Corporation v. Hill*, 290 So.2d 423 (La.App. 1974); *Harris v. Automatic Enterprises of Louisiana, Inc.*, 145 So.2d 335 (La.App.1962). The jury's finding that the waiver clause was not brought to the specific attention of GSM and that GSM did not waive the implied warranty of redhibition is in lock-step with Louisiana law.

Evidentiary Rulings

[8] K & T objected to the introduction of a logbook reportedly recording malfunctions of the MM-180 simultaneously with the occurrence of each problem. The district court admitted the logbook under Fed.R.Evid. 803(6) which authorizes evidentiary use of business records made at or near the time of the occurrence by or from information transmitted by a person with knowledge of the event if the record was kept as a regular practice in a regularly

conducted business. The record shows that GSM kept logbooks of problems for most if not all of its machines and that the keeping of logbooks on machines was a regular practice even before the MM-180 was acquired. The entries were made by the operators of the machine immediately after the malfunction occurred or within 24 hours of the difficulty, tracking handwritten notes which the operator made at the time. The trial court did not abuse its discretion in admitting the logbook. *See United States v. Vela*, 673 F.2d 86 (5th Cir.1982).

K & T also argues that the trial court erroneously admitted expert testimony over its objection of lack of foundation, about the damage sustained by GSM as a consequence of losing a customer, Gulfco. K & T maintains that there was a lack of direct testimony linking the loss of the customer's business to the defects in the MM-180. While the record contains no direct evidence as to the reason for the loss of Gulfco's business, there is sufficient evidence from which the jury reasonably could infer that consequence. The evidence reflects that there was only one other machine in the shop capable of the work done by the MM-180 and that machine was booked solid with the work for other customers. The record also indicates that orders which required the use of the MM-180 were rarely finished on time because of the frequent down-time; that GSM lost Gulfco's business during the period when the MM-180 was most inoperable; and that GSM had lost part of another customer's work at the same time because the breakdown of the MM-180 prevented timely completion of work orders. The record contains a sufficient basis for the trial court to overrule K & T's objection.

Jury Instructions

[9] The jury charge did not contain an instruction on credit for use. K & T now objects to its absence. K & T did not request that charge; the subject merely arose in the charge conference in connection with K & T's request for an instruction that the jury could, under the doctrine of *quanti minoris,* award a reduction in the purchase price rather than a return of the full price. After much discussion, the trial court included the requested reduction charge. K & T raised no further objections. Defendant's failure to specifically object to the lack of a credit-for-use charge, prevents our consideration of this claim of error. The injunction of Fed.R.Civ.P. 51 is express. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[10] Rule 51 also disposes of the other objection to the jury charge. K & T contends that the court should not have instructed the jury that lost profits could be an element of damages because no competent evidence on lost profits was offered. At the charge conference, K & T objected to that charge on the ground that it was not supported by the law; there was no contention advanced that the charge was not supported by the evidence. Since K & T did not then state this basis for its objection, it cannot now be heard to so argue.

Jury Award for Expenses Incurred

[11] GSM was billed $14,757 by K & T for parts and service on the MM-180 but the bill was never paid. Despite

this, the jury awarded GSM $14,757 for these expenses. While the $14,757 in charges would have been a proper item of damages if paid by GSM, it was not appropriate in the present setting. GSM is not entitled to reimbursement for expenses which it did not pay. Likewise, K & T is not entitled to payment of these charges, now or in the future. The jury award for these expenses is vacated.

Attorney's Fees

[12] The jury awarded GSM $30,000 for attorney's fees which K & T challenges as unsupported by the evidence. This claim is without merit. The record contains copies of bills showing charges to GSM of $25,957 for services rendered up to the week before trial. In addition to pretrial work, GSM's attorney represented it through eight days of trial. The evidence is sufficient to support an award of $30,000 in attorney's fees.

Attorney's Fees on Appeal

[13] GSM cross-appeals for additional attorney's fees on appeal. Such an award is not appropriate and the cross-appeal is denied.

Conclusion

We modify the judgment to delete the allowance of the expense recovery of $14,757, and as so modified, affirm.

MODIFIED and AFFIRMED.

ATTORNEY'S FEES DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82 3766

GULF SOUTH MACHINE, INC.,
Plaintiff-Appellee, Cross-Appellant,

versus

KEARNEY & TRECKER CORPORATION,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(May 15, 1985)

Before GEE, POLITZ and HIGGINBOTHAM, Circuie Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 81-888
SECTION "C" (5)

GULF SOUTH MACHINE, INC.

VERSUS

KEARNEY & TRECKER CORPORATION

* * *

JUDGMENT

(October 15, 1982)

This action came on for trial by jury on the merits before this Court, Honorable Robert F. Collins presiding, on September 20 through 29, 1982.

The Court having instructed the jury to make answer to certain interrogatories and the jury having made answer to said interrogatories;

IT IS ORDERED, ADJUDGED AND DECREED that the sale of the Milwaukee-Matic 180 Machining Center from defendant, Kearney & Trecker Corporation, to plaintiff, Gulf South Machine, Inc., be and the same is hereby rescinded and annuled, and the said machining center is to be returned to defendant, Kearney & Trecker Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of

plaintiff, Gulf South Machine, Inc., and against defendant, Kearney & Trecker Corporation, as follows:

(a) for refund of the purchase price	$153,820.00
(b) for repayment of any expenses incurred by plaintiff, including finance charges	14,757.00
(c) for attorney's fee	30,000.00
(d) for other damages which plaintiff has suffered	200,000.00
TOTAL	$398,577.00

plus interest thereon at the rate of ten percent (10%) per annum from and including March 6, 1981 through September 10, 1981, and at the rate of twelve percent (12%) per annum from and including September 11, 1981 until paid, together with all costs of these proceedings.

New Orleans, Louisiana, this the 15th day of October, 1982.

/s/ Nelson B. Jones
Clerk

APPROVED AS TO FORM:

/s/ Robert F. Collins
United States District Judge

GULF SOUTH MACHINE, INC.

VERSUS

KEARNEY & TRECKER CORPORATION

CIVIL ACTION

NO. 81-888

SECTION "C"

* * *

Interrogatories to the Jury on Redhibition

1. Was the Milwaukee-Matic 180 Machining Center, manufactured by defendant, Kearney & Trecker Corporation, defective in its manufacture, design or construction so as to render the machine absolutely useless or its use so inconvenient and imperfect such that the plaintiff, Gulf South Machine, Inc., would not have purchased the machine, had it known of the defect?

Answer: √ Yes or — No

If your answer to question No. 1 is "No," immediately date and sign this form and proceed to the second page of Interrogatories. If your answer to question No. 1 is "Yes," continue to the next question.

2. Was the waiver, as contained in Defendant's Exhibit No. B, either brought to the attention or explained to Gulf South Machine, such that the plaintiff effectively waived its rights under the implied warranty of fitness?

Answer: — Yes or √ No

If your answer to question No. 2 is "Yes," immediately date and sign this form and proceed to the second page of Interrogatories. If your answer to question No. 2 is "No," continue to the next question.

3. Did the plaintiff misuse the product, such that it is barred from recovery?

Answer: — Yes or √ No

If your answer to question No. 3 is "Yes," immediately date and sign this form and proceed to the second page of Interrogatories. If your answer to question No. 3 is "No," continue to the next question.

4. Now you may consider the issue of damages under redhibition. If you intend to award damages for a certain item, please check the appropriate line and fill in the amount when requested.

√ (a)	a refund of the purchase price (amount stipulated) or a reduction of purchase price in the amount of	$153,820.00
√ (b)	repayment of any expenses incurred by plaintiff, including finance charges, if any, in the amount of	$ 14,757.00
√ (c)	a reasonable attorney's fee in the amount of	$ 30,000.00
√ (d)	any other damages which you believe plaintiff has suffered in the amount of	$200,000.00

/s/ Linda S. Mistric
Foreperson

Date 9/29/82

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GULF SOUTH MACHINE, INC.

VERSUS

KEARNEY & TRECKER CORPORATION

CIVIL ACTION

NO. 81-888

SECTION: C MAG. 5

(Filed March 6, 1981)

COMPLAINT

The complaint of Gulf South Machine, Inc., a Louisiana corporation having its principal place of business in the Parish of Tangipahoa, State of Louisiana, respectfully represents that:

1.

The defendant, Kearney & Trecker Corporation, which does business in the State of Louisiana, is a Wisconsin corporation with its principal place of business in the State of Wisconsin.

2.

Jurisdiction is founded on diversity of citizenship pursuant to 28 U.S.C. § 1332(a); the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs.

3.

On or about October 5, 1978, petitioner purchased from defendant one Milwaukee-Matic 180 Machining Center, plus accessories.

4.

The aforesaid machine was designed and manufactured by defendant.

5.

The aforesaid machine was installed by defendant at petitioner's place of business on February 4, 1980, and the entire purchase price of $153,820 was paid in full by March 26, 1980.

6.

From the time it was installed, the machine never worked properly for any length of time and was never fit for the purpose intended.

7.

The defendant's efforts to repair its machine were generally unsuccessful and came to an end on or about November 20, 1980 when defendant refused to provide any further warranty service or spare parts to petitioner.

8.

As a result of defects in the design, manufacture, preparation, and installation of the machine and the defendant's failure to identify and correct said defects, petitioner has lost a significant amount of production time

while the machine was not operable, has suffered damage to its business reputation, and has sustained various other losses and expenses.

9.

The defendant has refused to accept petitioner's tender of the machine and accessories for a refund of the purchase price.

10.

The petitioner is entitled to a recision of the sale and a return of the full purchase price by the defendant; in the alternative only, the petitioner is entitled to quanti minoris and a reduction in said purchase price by the amount of $100,000, to be refunded to petitioner.

11.

In addition to the aforesaid return or reduction of the purchase price, the petitioner has sustained to date and is entitled to recover the following items of damages from the defendant:

$175,000	— Lost production from down time of machine
250,000	— Damage to business reputation
32,760	— Interest on loan for purchase price
14,757	— Cost of spare parts and accessories purchased from defendant
1,000	— Cost of spare parts purchased elsewhere
2,827	— Freight charges for shipment of spare parts to replace defective parts
37,500	— Extra payroll costs
25,000	— Attorney's fees
$538,844	— TOTAL

12.

The petitioner will continue to sustain losses and expenses in the future as a result of the substantial defects in the machine and reserves the right to claim additional damages as they occur.

13.

Amicable demand has been made to no avail.

14.

The petitioner is entitled to and prays for trial by jury.

WHEREFORE, petitioner prays that after due proceedings there be judgment herein in favor of Gulf South Machine, Inc. and against Kearney & Trecker Corporation in the full amount of $692,664.00, plus legal interest thereon and all costs of these proceedings; or in the alternative, for judgment in the full amount of $638,844.00, together with interest and costs as aforesaid; and for all other just and equitable relief.

LEMLE, KELLEHER,
KOHLMEYER & MATTHEWS

/s/ WILLIAM S. PENICK
GEORGE E. CAIN
21st Floor
Pan-American Life Center
601 Poydras
New Orleans, Louisana 70130
Telephone: (504) 586-1241
Attorneys for Petitioner, Gulf South Machine, Inc.

PLEASE SERVE:

Kearney & Trecker Corporation
pursuant to Louisiana Long-Arm Statute